93-277

93

Supreme Court, U.S.
FILED
JUN 7 1993
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HARRY S. THERIOT AND RAUL TREVINO,
Petitioners

vs.

GREAT WESTERN COCA COLA BOTTLING CO.
d/b/a COCA COLA BOTTLING COMPANY OF
HOUSTON,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

QUESTIONS PRESENTED

1. Does a suit subsequently filed against the Defendant in its actual name relate back to the original complaint filed against the Defendant in its assumed name, where the defendant knew that it was being sued?

2. Does the representation for the Equal Employment Commission to the Plaintiffs that the time for filing an age discrimination suit had been extended to six years by the Age Discrimination Claims Assistance Act of 1988 as amended in 1990, constitute a bar to the Petitioners furthering their Civil Rights cause of action when they relied upon such representation?

LIST OF PARTIES

The parties to the proceedings below were Robert T. Wallace, Christopher H. Steger, and Stephen P. Carrigan.

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HARRY S. THERIOT and **RAUL TREVINO**, petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the order filed on March 8, 1993, in Theriot and Trevino v. Great Western Coca Cola Bottling Co. d/b/a Coca Cola Bottling Company of Houston, No. 92-2393.

OPINIONS BELOW

The denial of the Respondent's motion for sanctions on March 17, 1993, has not been reported and is reprinted in the Appendix, App. at 1.

The denial of the Petitioners' motion for rehearing on March 8, 1993 and the opinion of the Court of Appeals for the Fifth Circuit entered on February 5, 1993 have not been reported and are reprinted in the Appendix, App. at 2 and App. at 3.

The memorandum and order decision of the United States District Court for the

Southern District of Texas, Houston Division (DeAnda, District Judge) has not been reported. It is reprinted in the Appendix, App. 5.

The final order of dismissal and memorandum opinion of the United States District Court for the Southern District of Texas, Houston Division, have not been reported and are reprinted in the Appendix. App. at 9 and App. at 10.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 1343 (App. at 34), 28 U.S.C. § 2201 (App. at 36) and 29 U.S.C. § 621, the Petitioners brought this suit in the United States District Court for the Southern District of Texas, Houston Division. On April 9, 1992, the Southern District Court granted the Respondent's motion to dismiss and entered its final order of dismissal and memorandum

opinion on April 10, 1992. See App. at 9 and App. at 10. On May 27, 1992 the Southern District Court entered its memorandum and order denying the Petitioners' motion to reinstate. See App. at 5.

On Petitioners' appeal, the Fifth Circuit on February 5, 1993 entered a judgment and an opinion affirming the Southern District Court's orders of dismissal directing that the Petitioners' causes of action be dismissed because they were barred by the statute of limitations pursuant to 29 U.S.C. §§ 626(e)(1), 255. See App. at 3. On March 8, 1993, the Fifth Circuit denied the Petitioners' motion for rehearing. See App. at 2, infra. On March 17, 1993, the Fifth Circuit denied the Respondent's motion for sanctions. See App. at 1.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1). App. at 33.

STATUTE INVOLVED

28 U.S.C. § 1291. Final decisions of district courts.

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of the Canal Zone, the United States District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the

jurisdiction described in §§ 1292 (c) and 1295 of this title.

STATEMENT OF THE CASE

On the 14th day of September, 1987, the Respondent, Great Western Coca-Cola Bottling Company d.b.a. Coca-Cola Bottling Company of Houston discharged the Petitioners, Harry S. Theriot and Raul Trevino, Maintenance Mechanics, who had been employed by the Respondent for 7 years and nine months and 8 years and 10 months, respectively.

On February 18, 1992, the Petitioners instituted this suit in equity, sounding in the protection of and the redress of the deprivation of their rights, pursuant to the Age Discrimination in Employment Act of 1967, § 2, 29 U.S.C. § 621, prohibiting job discrimination against employees between the ages of 40 and 78, on the basis of age, concerning hiring, discharging, training,

and classifying. The complaint alleged that Respondent had intentionally discharged the Petitioners because of their age, and replaced them with younger employees in violation of their rights under the Age Discrimination in Employment Act as amended, 29 U.S.C. § 621. That the Petitioners had in no way, violated any company policy, nor had they violated their duty of employment. That the Petitioners were in good health and were prevented from at least reaching their ten (10) years of vested retirement. That the Petitioners were well qualified for the positions they held, and were performing their duties in accordance with the policies of the Respondent, and were victims of lay-offs solely because of their age, and not because of business necessity, and were replaced with employees less qualified.

On March 17, 1992, the Respondent filed

its Motion to Dismiss the Petitioners' Complaint for failure to state a claim upon which relief could be granted, as well as its Brief in Support of Motion to Dismiss.

On April 8, 1992, the Petitioners filed the Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss along with their Exhibits "A" through "K", and proposed order.

Thereafter, on the 9th day of April, 1992, the Honorable James DeAnda, the presiding Chief Judge of the United States District Court issued his Memorandum Opinion dismissing the Petitioners' claims of age discrimination (App. at 10) and entered his Final Order of Dismissal on the 10th day of April, 1992. App. at 9.

On April 17, 1992, the Petitioners filed their Motion to Reinstate and the Plaintiffs' Exhibit "A" in Support of Plaintiffs' Motion to Reinstate. The

Respondent filed the Defendant's Response to Plaintiffs' Motion to Reinstate on May 7, 1992, and its Memorandum in Support of Defendant's Opposition to Plaintiffs' Motion to Reinstate.

On the 8th day of May, 1992, the Petitioners filed their first Notice of Appeal to the Fifth Circuit Court of Appeals from the Final Order of Dismissal entered by the District Court on April 10, 1992.

On the 27th day of May, 1992, the District Court entered its Memorandum and Order and denied the Plaintiffs' Motion to Reinstate. App. at 5.

The Petitioners allege that the District Court totally ignored the fact that the Respondent had acknowledged that it had been served with Petitioners' Original Complaint by service to the manager of its facility in Houston, Texas when it filed

Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings. That the lower Court further failed to recognize the fact that the Respondent, Coca-Cola Enterprises, Inc., was actually timely served within 120 days of the filing of the Petitioners' second Complaint pursuant to a summons that was issued on December 23, 1991 and a letter dated December 27, 1991 advising Josh Curnell, the process server for the Petitioners that C.T. Corporation was not the registered agent for Coca Cola Enterprises, Inc., and the lower Court further failed to consider or recognize the request of the Petitioners to relate their civil action complaint that they filed on February 18, 1992 back to the filing of their Original Complaint.

The Petitioners assert that the Respondent complicated the issue of notice by continuing to do business as Coca Cola

Bottling Company of Houston approximately fifteen years after registering its name as Great Western Coca Cola Bottling Company and failed to state the same when suit was filed against it.

The Petitioners subsequently discovered that Great Western Coca-Cola Bottling Company was apparently a subsidiary of J.T.L. Enterprises (J.T.L. Corporation or Lupton Group) before it was acquired by Coca-Cola Company and reorganized as a bottling operation when The Coca-Cola Company created Coca-Cola Enterprises, Inc.

The Petitioners' relation back theory is that since Coca-Cola Enterprises is now the parent corporation of Great Western Coca-Cola Company and its Board of Directors are directors of the subsidiary, the Coca-Cola Company in Houston, Texas is directly controlled by Coca-Cola Enterprises. That Coca-Cola Enterprises is in fact the true

owner of said subsidiary, which means that the Houston Coca Cola Company is an alter ego of Coca-Cola Enterprises. Thus, the corporate vail or umbrella had to be pierced in order to reach the real owner.

The Petitioners theorize that their Complaints should be considered as amendments and should relate back to their first Original Complaint. Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that but for the

> mistake concerning the identity of the proper party, the action would have been brought against him." (See 1991 Amendment, App. at 40).

In the instant case, the Respondent, Great Western Coca Cola Bottling Company D.B.A. Coca-Cola Bottling Company of Houston knew the suit was being brought against it when suit was originally filed against Houston Coca-Cola Bottling Company of Houston, Texas. The Petitioners contend they had left the registered agent for service in their original complaint blank and had served the officers of the Respondent since the Respondent had no registered agent under its assumed name. However, when the Defendant filed an answer alleging that proper service had not been made on its registered agent, there is no question but that the Respondent knew that it was being sued.

Although the Respondent had filed Defendant's Motion to Dismiss Complaint and Motion for Partial Judgment on the Pleadings (Record at 0040, App. at 12) and its Brief in Support of Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings (Record Excerpts at 50 and App. at 14) and had moved for dismissal on grounds that its registered agent was not served within the limitation of Rule 4(j) of the Federal Rules of Civil Procedure, the Honorable Lynn N. Hughes, United States District Judge apparently dismissed the civil action of the Appellants[1] without

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[1]Petitioners were denied their rights to due process when the District Judge, Lynn N. Hughes, failed to accord them an opportunity to respond to the Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings. It is evident from the Defendant's Brief in Support of Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings that Defendant, Houston Coca-Cola Bottling Company, was timely served with Plaintiffs' Original Complaint at the bottling plant at

viewing the Appellee's pleadings nor recognizing the fact that the Petitioners had served the Houston Coca-Cola Bottling Company at 2800 Bissonnet, Houston, Texas which, was the proper agent of the Respondent at that time since the Secretary of State of Texas did not have a listing of a registered agent for Houston Coca-Cola Bottling Company when the Petitioners filed their original complaint on September 14, 1989. (Record at 0044).

The Petitioners contended on appeal to the Fifth Circuit that the lower Court limited the Petitioners claims of Age

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2800 Bissonnet in Houston, Texas where the Petitioners had been discharged from their employment with Defendant as maintenance mechanics and replaced with younger employees on September 14, 1987. Thus, the Respondent was timely served within 120 days as required by Rule 4(j) of the Federal Rules of Civil Procedure by the Respondent's own admission. Therefore, Judge Hughes failed to accord due process to the Petitioners because he dismissed their Original Complaint without a hearing.

Discrimination to § 255 of 29 U.S.C.A. of the Fair Labor Standards Act of 1938, as amended since the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C.A. § 621 did not provide an independent statute of limitation.

That since the subsidiary Respondent, Great Western Coca-Cola Bottling Company was owned and controlled by the parent corporation, Coca-Cola Enterprises, Inc., and was known to distribute their beverage products throughout the United States and the rest of the world as well as contracting to provide the Departments of the Army, Air Force, Navy, and Marines with large quantities of their beverage products for consumption to military and federal agencies, and are further known to transport their beverage products in interstate commerce, the Petitioners, Harry S. Theriot and Raul Trevino, Maintenance

Mechanics, who has been employed by the Respondent should have been treated no differently than federal employees since the Respondent's contractual relationships with the United States Government had brought the Respondent under certain federal guidelines in the employment of its employees based upon age, sex, handicapped conditions, etc., as well as requiring the Respondent to provide protection of older workers against discrimination in the workplace.

That Petitioners were led to believe that their age discrimination claims were subject to the six year statute of limitations that was allowed for federal employees pursuant to Lubniewski v. Lehman, 891 F.2d 216 (CA9, 1989) and the catch all statute of limitations for non-tort civil claims against the United States as provided under 28 U.S.C. § 2401(a) (1982)

because of the Respondent's contractual relationship with the United States Government.

That in reliance upon the representation of the Equal Employment Opportunity Commission, the Petitioners further forewent their action in this cause and proceeded with locating the Respondent and its registered agent because the E.E.O.C. repeatedly advised them that they were no longer subject to the two and three year statute of limitation after their suit was dismissed in 1990. Since the Petitioners had originally filed suit on the 14th day of September, 1989, their time to refile under the six year non-tort statute would have run until September 14, 1993.

On March 8, 1993, a three-judge panel denied the Petitioners' Petition for rehearing. App. at 2.

The final order sent to the Petitioners

from the Court of Appeals for the Fifth Circuit was an order of a three-judge panel that denied the Respondent's Motion for sanctions on March 17, 1993. App. at 1.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT'S DECISION OF AFFIRMANCE WITH THE DISTRICT COURT AND ITS DENIAL OF THE PETITIONERS' MOTION FOR REHEARING CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE THEORY OF A SUBSEQUENTLY FILED SUIT RELATING BACK TO THE ORIGINAL COMPLAINT.

Petitioners' cause of action arose on the 14th day of September, 1987. The Petitioners timely filed their suit on September 14, 1989, which was within the three year limitation period, and timely served the Defendant, Houston Coca-Cola Bottling Company within the 120 day limitation period under Rule 4(j) of Federal Rules of Civil Procedure. Said suit was dismissed under Rule 4(j) for

failure to prosecute.

Since the Respondent had changed its name from Houston Coca Cola Bottling Co. to Great Western Coca Cola Bottling Company, the Petitioners were unable to locate its registered agent through the Secretary of State.

On August 29, 1991, the Petitioners filed suit against the parent company, Coca Cola Enterprises and served a copy of their summons and complaint upon C. T. Corporation. Said corporation alleged that it was not the registered agent for Coca Cola Enterprises. Said suit was dismissed under Rule 4(j) for failure to prosecute.

During all times material to this cause, the Secretary of State was unable to locate a listing for Respondent, or the name of the registered agent for the Respondent, Coca Cola Bottling Company. However, the secretary gave the Petitioners the listings

of Austin Coca Cola Bottling Company and San Antonio Coca Cola Bottling Company, neither of which were the Respondent.

Subsequently, on January 8, 1992, the Secretary of State after an extensive search, notified Petitioners that Respondent's name had been changed to Great Western Coca Cola Bottling Company. At all times material to this cause, the Respondent was doing business as Houston Coca Cola Bottling Company, which was the reason why the Petitioners were unable to locate the Respondent.

Subsequently, on February 18, 1992, the Petitioners filed suit against Great Western Coca Cola Bottling Company and timely served its agent with a copy of the complaint and summons. The Petitioners' suit was dismissed as being time barred by the statute of limitations.

It is clear that Petitioners' suit,

filed February 18, 1992 relates back to their original complaint. The relation back of amendments is governed by Rule 15(c) of the Federal Rules of Civil Procedure, and the Supreme Court recently has set forth four factors for determining when an amended pleading relates back. Schiavone v. Times Magazine Company, 106 S.Ct. 2385:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it, and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

In Dacus v. United States Postal Service, No. 87-6067 (5th Circuit, 1987), the Court ruled that: "Dacus could have satisfied the notice requirement by contacting within the limitations period "the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named . . ." Fed. R. Civ. P. 15(c). Here, no government entity was served until February 13, 1987. Postmaster General Tisch could not have known within the limitations period that a suit would have been brought against him but for Dacus' mistake in naming the proper defendant. The amendment thus cannot relate back. See Bell v. Veterans Administration Hospital, 826 F.2d 357, 359 (5th Cir. 1987); Gonzalez v.

Secretary of Air Force, 824 F.2d 392, 395-96 (5th Cir. 1987)."

In the case at bar, unlike the "Dacus" case, the Petitioners filed suit against Houston Coca Cola Bottling Company and timely served it with summons and complaint. The Respondent filed an answer stating that its registered agent was not properly served, when in fact C.T. Corporation was not the registered agent of Houston Coca Cola Bottling Company, but was in fact the registered agent of Great Western Bottling Coca-Cola Bottling Company.

When the Petitioners finally discovered that the name registered for Respondent was Great Western Coca Cola Bottling Company, they filed suit against Great Western. When Petitioners filed their original suit against Houston Coca Cola Bottling Company, Great Western knew that it was being served

because its assumed name was Houston Coca Cola Bottling Company. Therefore, the Petitioners' suit against Great Western Coca Cola Bottling Company relates back to their original suit against Houston Coca Cola Bottling Company.

In Dacus, supra, the Court said that Dacus may serve the complaint any time within the 120 days, for purpose of relating back, and the defendant must receive notice within the period set by the Statute of limitation.

II. THE FIFTH CIRCUIT'S DECISION OF AFFIRMANCE WITH THE DISTRICT COURT AND ITS DENIAL OF THE PETITIONERS' MOTION FOR REHEARING CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS WHERE THE PETITIONERS HAVE RELIED UPON THE REPRESENTATION OF A FEDERAL AGENCY AND HAVE BEEN PREVENTED FROM ASSERTING THEIR RIGHTS.

The Petitioners were led to believe that their age discrimination claims were subject to the six year statute of limitations that was allowed for federal

employees pursuant to Lubniewski v. Lehman, 891 F.2d 216 (CA9, 1989) and the catch all statute of limitations for non-tort civil claims against the United States Government as provided under 28 U.S.C. § 2401(a) (1982) because of the Respondent's contractual relationship with the United States Government.

In reliance upon the representation of the Equal Employment Opportunity Commission, the Petitioners further forewent their action in this cause and proceeded with locating the Respondent and its registered agent because the E.E.O.C. repeatedly advised them that they were no longer subject to the two and three year statute of limitation after their suit was dismissed in 1990. Since the Petitioners had originally filed suit on the 14th day of September, 1989, their time to refile under the six year non-tort statute would

have run until September 14, 1993.

In Johnson vs. United States Postal Service, 861 F.2d 1475, at 1480, quoting Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984) the Court held that limitation will be tolled:

> "Only where the circumstances of the case rise to a level of active deception sufficient to invoke the powers of equity. For instance, equitable tolling may be appropriate where a plaintiff has been lulled into inaction . . . by federal agencies or the Court, or has in some extraordinary way been prevented from asserting his or her rights, we will permit the tolling period."

The Petitioners rightfully and reasonably believed that the E.E.O.C. was knowledgeable of the procedures of filing civil right suits in the Federal Courts, and therefore the Petitioners are entitled to the tolling of the limitation period.

It was not a mistake nor the lack of diligence on Petitioners' part, but reliance upon the representation of a

federal agency of the government that advises civil right complainants of their rights to sue, and the time to file suit.

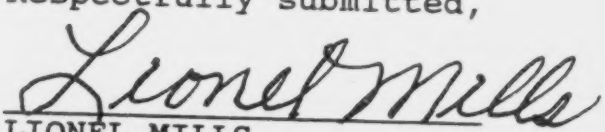
This was clearly demonstrated when Congress extended the time for hundreds of age discrimination employees to file suit upon a mistake or oversight of the Equal Employment Opportunity Commission.

The Petitioners are honest, hard working Maintenance Mechanics who have spent long hours, working at the Respondent's bottling plant to improve the quality of production and enhance safe working conditions in their work place. If fairness, equity, and justice are to survive in our country, these working men must be allowed their opportunity to be heard in our courts.

In summary, this Petition should be granted. If the Petitioners are correct in urging that the District Court decision affirmed by the Court of Appeals for the

Fifth Circuit is in conflict with the established decisions of this Court, the matter herein should be remanded to the District Court for appropriate disposition because due process must be accorded to every citizen to protect the integrity of the judiciary and to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitation defense.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2393

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants,

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company
of Houston,

Defendant-Appellee.

Appeals from the United States District
Court for the Southern
District of Texas

Before GARWOOD, JONES and EMILIO M. GARZA,
Circuit Judges,
BY THE COURT:

IT IS ORDER that appellee's motion for sanctions is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2393

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company of
Houston,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING

(March 8, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
Emilio M. Garza
United States Circuit Judge

# # # # # # #

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2393
(Summary Calendar)

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company of
Houston,

Defendant-Appellee.

Appeals from the United States District
for the Southern District of Texas
(CA H 92 488)

Before GARWOOD, JONES, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:[b]

We have reviewed the record in this case and agree with the district court that plaintiffs' causes of action,[1] arising from their discharge on September 14, 1987, are barred by the statute of limitations. See 29 U.S.C. §§ 626(e)(1), 255.

Accordingly, we AFFIRM.

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[b]Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession. Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Plaintiffs filed the underlying complaint on February 18, 1992. See Record on Appeal at tab 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO, Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-92-488
GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant.	§	

MEMORANDUM AND ORDER

By order signed April 9, 1992, the above-referenced matter was dismissed with prejudice as time-barred. The case is now before the Court on plaintiffs' motion to reinstate, in which plaintiffs assert that the action was not timely filed because they were unable to locate defendant's registered agent. The Court, having carefully considered the motion to reinstate and the opposition thereto, finds that plaintiffs' motion to reinstate is

without merit and should be denied.

It is undisputed that plaintiffs' employment with defendant was terminated on September 14, 1987. Plaintiffs filed a complaint, civil action H-89-3171, on September 14, 1989, which was assigned by Judge Lynn Hughes. That case was dismissed pursuant to Rule 4(j) on January 18, 1990 for failure to serve the summons and complaint within 120 days of the filing of the complaint. Plaintiffs did not assert in that case an inability to locate defendant's registered agent as the basis for a motion to reinstate. Instead, plaintiffs waited until August 29, 1991 and filed a second lawsuit, civil action H-91-2453, which was assigned to Judge David Hittner. That case was dismissed pursuant to Rule 4(j) on January 2, 1992. Again, plaintiffs did not move to reinstate. The case at bar, plaintiffs' third lawsuit

regarding the termination of their employment, was filed February 18, 1992, approximately six weeks after the 4(j) dismissal in Judge Hittner's court. On motion of defendant, the case was dismissed with prejudice as outside the two-year statute of limitations for actions under the Age Discrimination in Employment Act. Plaintiffs moved to reinstate and, for the first time since their discharge in September 1987, asserted that they had been unable to locate a registered agent for defendant.

Plaintiffs' allegation that they were unable to effect service on defendant because they could not identify a registered agent lacks credulity. Initially, the Court notes that the assertion was not raised in the two prior cases to explain the failure to effect service and to avoid dismissal or seek

reinstatement. Additionally, plaintiffs have submitted no documentation indicating that they attempted unsuccessfully to locate a registered agent. Plaintiffs' attempt to excuse their failure to file within the proper limitations period also ignores the alternative methods of service provided by Rule 4 of the Federal Rules of Civil Procedure, specifically service upon an officer or a managing or general agent. Finally, the Court also notes that plaintiffs assert in their complaint that the action is timely filed "within the five year limitation period provided under 29 U.S.C. § 621."

Based upon the foregoing, the Court finds that the motion to reinstate is without merit. Accordingly, it is hereby

O R D E R E D

that plaintiffs' motion to reinstate is DENIED.

SIGNED this 26th day of May, 1992.

/s/
James DeAnda
Chief Judge
United States
District Court

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-92-488
GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant.	§	

FINAL ORDER OF DISMISSAL

In accordance with the memorandum opinion signed this day, it is hereby

O R D E R E D

that defendant's motion to dismiss is GRANTED and the above referenced case DISMISSED WITH PREJUDICE.

Taxable costs are assessed against plaintiffs. THIS IS A FINAL ORDER.

SIGNED this 9th day of April, 1992.

/s/
J. DeAnda
Chief Judge
United States
District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-92-488
GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant.	§	

MEMORANDUM OPINION

This case is before the Court on defendant's motion to dismiss, in which defendant asserts that plaintiffs' age discrimination claims are barred by the

statute of limitations. Claims filed under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., must be filed within two years, unless the alleged violation is a willful one, in which case the complaint must be filed within three years. 29 U.S.C. § 626(e)(1), 29 U.S.C. § 255. In the case at bar, plaintiffs allege that they were discharged from their employment with defendant on September 14, 1987. Plaintiffs did not file their complaint until February 18, 1992, approximately four years and five months after their discharge. As a result, their claims of age discrimination are time-barred and must be dismissed. An appropriate final order of dismissal consistent with this memorandum opinion shall be issued this day.

SIGNED this 9th day of April, 1992.

/s/
J. DeAnda
Chief Judge
United States District
Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
	§	H-89-3171
HOUSTON COCA-COLA BOTTLING COMPANY, INC., Defendant.	§	

DEFENDANT'S MOTION TO DISMISS COMPLAINT
AND MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS

Defendant Houston Coca-Cola Bottling Company, Inc. ("HCCBC"), pursuant to Federal Rules of Civil Procedure 12(b)(5) and 4(j), hereby moves this Court to dismiss Plaintiffs' Complaint against HCCBC on the grounds, more fully explained in the brief filed herewith, that there has been

an insufficiency of service of process and an untimeliness of service on behalf of Plaintiffs.

Alternately, HCCBC, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, moves this Court for a partial judgment on the pleadings with respect to Paragraph 5 of Plaintiffs' prayer for relief, requesting an award of pecuniary damages, on the ground, set forth in the attached brief, that the pecuniary damages requested are not allowable under the Age Discrimination in Employment Act, 29 U.S.C. §§ 612, et. seq.

WHEREFORE, HCCBC respectfully requests that this Motion and the grounds therefore be inquired into and that an order granting the Motion be entered.

EXHIBIT
"C"

This 15th day of January, 1990.

JENKENS & GILCHRIST

By:/s/
Thomas Hunt
1100 Louisiana
Suite 900
Houston, Texas 77002

Attorneys for Defendant Houston Coca-Cola Bottling Company, Inc.

0039

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO Plaintiffs,	§	
vs.	§	CIVIL ACTION FILE
HOUSTON COCA-COLA	§	NO. H-89-3171

BOTTLING COMPANY, §
INC., §
Defendant. §

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO *DISMISS AND MOTION* FOR PARTIAL JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Harry S. Theriot and Raul Trevino ("Plaintiffs") were discharged by Houston Coca-Cola Bottling Company, Inc. ("HCCBC") in a reduction in work force on September 14, 1987. Plaintiffs filed charges with the Equal Opportunity Employment Commission ("EEOC"), pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 612 et. seq. In its response to the EEOC, HCCBC denied that its actions were, in any way, motivated by Plaintiffs' ages; rather, HCCBC documented its decision to terminate Plaintiffs based upon a necessary reduction in force, and corresponding poor work performance by Plaintiffs.

On December 5, 1988, the Houston branch of the EEOC issued "no cause" determination with respect to both Mr. Theriot's and Mr. Trevino's charges against HCCBC. See Exhibit A. Subsequently, on May 17, 1989 and June 9, 1989 respectively, the Washington division of the EEOC affirmed the regional office's "no cause" determinations regarding Mr. Trevino's and Mr. Theriot's charges. See Exhibit B.

HCCBC recently became aware that on September 14, 1989, the last date for the running of the statute of limitations in this action, Plaintiffs filed an ADEA complaint with this Court. HCCBC is also aware that Plaintiffs apparently attempted service by mail, not upon HCCBC's registered agent for service of process, CT Corporation System, but rather pursuant to an envelope merely addressed "Ccca-Cola Bottling Company" sent, not to any

authorized agent of HCCBC, but rather to one its production facilities. In fact, Plaintiffs' Complaint does not even support its jurisdictional statement as to HCCBC, leaving blanks in reference to HCCBC's residence and authorized agent for service of process. See Exhibit C, p. 2 (Plaintiffs' Complaint). Additionally, Plaintiffs' Complaint seeks remedies clearly unavailable under the ADEA. Exhibit C, p. 3.

On January 12, 1990, 120 days passed from the filing of Plaintiffs' Complaint. As of the date of this Motion, Plaintiffs have not effected service upon HCCBC.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The service of process attempted by Plaintiffs was insufficient pursuant to Federal Rule of Civil Procedure 12(b)(c).

Plaintiffs' half-hearted, and to the

best of HCCBC's knowledge, only attempt to serve HCCBC within the 120 day period mandated by Rule 4(j) of the Federal Rules of Civil Procedure is insufficient under the Federal Rules of Civil Procedure.

Plaintiffs did not attempt to serve HCCBC in a prompt fashion, evidenced by the fact that no record exists of a summons issued upon filing of the Complaint. See Exhibit D (documentation delivered by this Court to HCCBC pursuant to HCCBC's efforts to obtain information about this Complaint). Plaintiffs did not attempt to utilize HCCBC's registered agent for service of process, or even attempt service on any authorized individual of HCCBC. The only known attempt at service is that of an envelope designated "Coca Cola Bottling Company" delivered to one of HCCBC's plant facilities, and only fortuitously and

belatedly brought to the attention of appropriate HCCBC representatives.

In a case with facts virtually on "all-fours" with the facts in this case, the Fifth Circuit has held that dismissal is appropriate. In Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728 (5th Cir. 1985), plaintiff contended that the single certified mailing to a defendant, via restricted delivery, return receipt requested, "was the effective equivalent of the service-by-mail detailed in Fed. R. Civ. P. 4(c)(2)(C)(ii), "despite the fact that no acknowledgement was received from the defendant. Albano at 729. The Fifth Circuit examined this contention and rejected it, affirming the Southern District of Texas' prior dismissal based upon sufficiency of service of process, and concluding that:

> Rule 4(c)(2)(C)(ii) is an integrated procedure for establishing and proving in personam jurisdiction as well as service of process and that the defendant's return and acknowledgement are an essential part of that procedure. It necessarily follows that the requirements of Rule 4(c)(2)(C)(ii) must be fully satisfied if the benefits of the Rule are claimed.

Albano at 730.

Plaintiffs' failure to service HCCBC in a manner designated to give timely notice of this suit, i.e. by the simple process of looking up its registered agent, or even taking additional steps after the lack of response by HCCBC, is illustrative of the half-hearted attempts in effecting proper service disapproved by the Fifth Circuit.

"Only careful compliance with 4(c)(2)(C)(ii) will suffice." Id.

Plaintiffs were put on notice that service by mail was ineffective when they did not receive an acknowledgement of service. Apparently, Plaintiffs were content to let over 120 days elapse without further attempt to ensure that an authorized agent of HCCBC was given notice of the complaint. Thus, the reasoning of the Fifth Circuit in the factually parallel case of Albano is equally applicable to this action:

> The service of process attempted by [plaintiff] accords with neither state nor federal service requirements. The service on [defendant] was insufficient.

Albano at 730.

Thus, based on the facts of this case and the authority established in Albano,

Plaintiffs' action should be dismissed.

B. Plaintiffs' failure to effect service upon HCCBC within 120 days of the filing of their Complaint mandates dismissal of this action pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

Rule 4(j) of the Federal Rules of Civil Procedure ("F.R.C.P.") imposes an affirmative duty upon a plaintiff to effect service of his or her summons and complaint upon a defendant within 120 days after the filing of the complaint. A failure to do so mandates dismissal of that complaint. Specifically, Rule 4(j) provides that:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service

> was required cannot show good cause why such service was not made within that period, the action will be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion . . ."

F.R.C.P. 4(j).

Further, the Fifth Circuit has interpreted Rule 4 such that attempted service by mail does not satisfy the federal requirements. Rather, should such service be deficient, regarding either the form of service or due to the fact that receipt was never acknowledged, a plaintiff must take additional steps to ensure proper service. As stated by the Fifth Circuit,

> A plaintiff may attempt the inexpensive method of using the mail. If the plaintiff does not effect service in this way, service

must be made in some other fashion. Humana, Inc. v. Avram A. Jacobson, M.D., P.A., 804 F.2d 1390, 1393 (5th Cir. 1986) [emphasis added].

Additionally, the plain language of Rule 4(c)(2)(C)(ii) requires a plaintiff to take a "second step" to effect service, should no acknowledgement be received pursuant to attempted service by mail.

> If no acknowledgement of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

F.R.C.P. Rule 4(c)(2)(C)(ii).

The clear language of the Rule, supported by the Fifth Circuit decision,

and the total failure by plaintiffs to ensure that HCCBC was properly served within 120 days of the filed Complaint, mandates dismissal of this action pursuant to Rule 4(j).

C. Absent a showing of good cause for failure to properly effect service, Plaintiffs' Complaint must be dismissed.

The good cause exception to Rule 4(j)'s 120 day service period is strictly construed by the courts. See generally, Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3rd Cir. 1987) (legislative history's example of good cause references only a defendant who intentionally evades service); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985) (good cause standard of Rule 4(j) stricter than excusable neglect standard of Rule 6(b)(2)).

A failure to properly serve a defendant, within the 120 day period, based on no more than a plaintiffs' lack of reasonable diligence in taking steps to ensure proper service, justifies dismissal of the case. See, e.g., Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985) (mere neglect, inadvertence or ignorance of rules in failing to properly effect service does not establish good cause); U.S. for Use and Benefit of DeLoss v. Kenner General Contractors, Inc., 764 F.2d 707 (9th Cir. 1985) (plaintiffs' half-hearted efforts to effect service prior to 120 day deadline merits dismissal of case); Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 661 (D. Md. 1986) (party's lack of diligence in requesting an extension of time to effect service may indicate lack of good cause).

HCCBC has not attempted to avoid proper

service. A minimal attempt by Plaintiffs to ascertain HCCBC's registered agent for service of process would have effected prompt and proper service upon it in a timely fashion.

Further, HCCBC is not aware of any subsequent "second step" taken by Plaintiffs to properly serve HCCBC, as required by Federal Rule 4(c)(2)(C)(ii), upon a defendant's lack of response to attempted service by mail. See generally, Humana and Albano, supra.

Finally, HCCBC is unaware of any request by Plaintiffs for a Rule 6(b) enlargement of time within which to properly effect service upon HCCBC. See e.g., Reed Holdings Inc. v. O.P.C. Corp., 122 F.R.D. 441 (S.D.N.Y. 1988) (dismissal proper when plaintiff didn't seek Rule 6(b) relief and service wasn't again attempted until after 120 day period); Quann, supra (once counsel

is aware of service problem, no reason why service couldn't be made within time period).

Plaintiffs' failure to exercise even minimal diligence to effect proper service initially, or to take any additional measures to ensure proper service once put on notice that service by mail was ineffective, establishes a lack of good cause, and merits dismissal of this action.

D. The pecuniary damages requested in Paragraph 5 of Plaintiffs' prayer for relief are not available under the ADEA, and must be stricken from the Complaint.

Paragraph 5 of Plaintiffs' prayer for relief asks this Court to "Order Defendant to pay Plaintiffs pecuniary damages in the sum of $250,000.00 each . . ." This remedy is requested in addition to Plaintiffs' prayer for awards of reinstatement, back

pay, costs, and for equitable relief in the form of an injunction and a declaratory judgment. Exhibit C, p. 3.

While Plaintiffs' characterized the requested damages as "pecuniary," it is obvious that this term is merely a euphemism for additional monetary damages not recoverable under the ADEA. Plaintiffs have exhausted the remedies available pursuant to the ADEA, with the exception of liquidated damages neither alleged nor prayed for, in this action. See Dean v. American Security Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977), cert. denied, 434 U.S. 1066, 98 S.Ct. (1978) (Remedies available under the ADEA encompass "prompt reinstatement, promotion or other equitable relief coupled with lost wages, and liquidated damages, if appropriate . . .")

Plaintiffs' prayer for additional "pecuniary" damages, in excess of those

remedies provided by the ADEA, can only be categorized as an additional request for punitive damages or emotional distress damages, in the form of pain and suffering. In this regard, the Fifth Circuit has unequivocally held that general damages for pain and suffering, and punitive damages are not available remedies under the ADEA:

> We are in accord with the result reached in Rogers v. Exxon Research & Engineering Co.. . . . in rejecting a claim for damages for pain and suffering in a private action brought under the ADEA.
>
> . . .
>
> [Plaintiff's] claim for punitive damages fares no better [than] his claim for general damages . . .

Dean at 1038-39. Accord Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124, 1128 (S.D. Tex. 1977). Accordingly, Plaintiffs'

claim for pecuniary damages in Paragraph 5 of the prayer for relief must be stricken from the Complaint.

III. CONCLUSION

Based upon these facts set forth above and the controlling case law, Houston Coca-Cola Bottling Company, Inc. respectfully requests that Plaintiffs' Complaint be dismissed pursuant to Rules 12(b)(5) and 4(j) of the Federal Rules of Civil Procedure, or that the pecuniary damages requested in Paragraph 5 of Plaintiffs' prayer for relief be stricken from Plaintiffs' Complaint in a partial judgment on the pleadings.

This 15th day of January, 1990.

JENKENS & GILCHRIST

By:/s/
Thomas Hunt

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Attorneys for Defendant Houston Coca-Cola Bottling Company, Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY S. THERIOT and RAUL TREVINO Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-89-3171
HOUSTON COCA-COLA BOTTLING COMPANY, INC., Defendant.	§	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing

"DEFENDANT'S MOTION TO DISMISS COMPLAINT AND MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS and BRIEF IN SUPPORT" on counsel for Plaintiffs by depositing same in the United States mail, with adequate postage affixed thereto, and addressed to:

Robert Tilden Wallace
14507 Chasemont Dr.
Missouri City, TX 77489

This 15th day of January, 1990.

JENKENS & GILCHRIST

By: /s/
Thomas Hunt

1100 Louisiana
Suite 900
Houston, Texas 77002

OF COUNSEL:

Philip A. Bradley
Cathy L. Peterson

LONG, ALDRIDGE & NORMAN
Two Concourse Parkway
Suite 750
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(404) 527-8300

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FEDERAL STATUTES:
28 U.S.C. 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1343:

Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of

citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. 2201:

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal

Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. 2401:

Time for commencing action against

United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

29 U.S.C. 255:

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended. [citations omitted]

> (a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

Relevant Federal Rules of Civil Procedure

Rule 4(j):

Summons: Time Limit for Service. If a

service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 15(c): (1991 Amendment)

Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relations back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in

the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to

the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into action as a defendant.

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